Supreme Court, U.S.
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No. 93-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILBURT A. SEIGEL,

Petitioner,

v.

JAMES ISLAND PUBLIC SERVICE DISTRICT; GEORGE W. FLYNN, GEORGE W. WITHAM; BARBARA M. LADSON; SYLVIA F. PETERS; JOHN B. BRYANT; NANCY H. HADLEY; RAY J. PATTERSON, JR., CONSTITUTING THE MEMBERSHIP OF THE COMMISSIONERS OF THE JAMES ISLAND PUBLIC SERVICE DISTRICT; ROBERT E. WELCH, MANAGER, JAMES ISLAND PUBLIC SERVICE DISTRICT; EDWIN B. QUINN, WASTEWATER SUPERINTENDENT, JAMES ISLAND PUBLIC SERVICE DISTRICT, SINKLER & BOYD, P.A.; THOMAS C. HILDEBRAND, JR.; V. CLAIR ALLEN; STEPHEN E. DARLING; COUNTY OF CHARLESTON; WILLIAM T. HOWELL, JUDGE; J. ALTON CANNON JR., SHERIFF, CHARLESTON COUNTY; ROBERT MILLER, JR., UNDERSHERIFF, CHARLESTON COUNTY; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; PARKER EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; P. DOUGLAS TAYLOR, WARDEN, LIEBER CORRECTIONAL INSTITUTION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS SINKLER & BOYD, P.A., THOMAS C. HILDEBRAND, JR., V. CLAIR ALLEN, AND STEPHEN E. DARLING, IN OPPOSITION

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QUESTION PRESENTED

Respondents Sinkler & Boyd, P.A., Thomas C. Hildebrand, Jr., V. Clair Allen, and Stephen E. Darling believe that the only question presented, as it relates to them, is properly stated as follows:

> **Whether the lower courts were correct in holding that the actions of a privately retained law firm, in instituting state court legal proceedings on behalf of their client, did not constitute action taken under color of state law for purposes of liability under 42 U.S.C. §1983.**

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Sup. Ct. R. 10. 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Wilburt A. Seigel,

Petitioner,

v.

James Island Public Service District; George W. Flynn; George W. Witham; Barbara M. Ladson; Sylvia F. Peters; John B. Bryant; Nancy H. Hadley; Ray J. Patterson, Jr., Constituting the Membership of the Commissioners of the James Island Public Service District; Robert E. Welch, Manager, James Island Public Service District; Edwin B. Quinn, Wastewater Superintendent, James Island Public Service District, Sinkler & Boyd, P.A.; Thomas C. Hildebrand, Jr.; V. Clair Allen; Stephen E. Darling; County of Charleston; William T. Howell, Judge; J. Alton Cannon Jr., Sheriff, Charleston County; Robert Miller, Jr., Undersheriff, Charleston County; South Carolina Department of Corrections; Parker Evatt, Commissioner, South Carolina Department of Corrections; P. Douglas Taylor, Warden, Lieber Correctional Institution,

Respondents,

Brief of Respondents Sinkler & Boyd, P.A., Thomas C. Hildebrand, Jr., V. Clair Allen and Stephen E. Darling, In Opposition

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Respondents Sinkler and Boyd, P.A., Thomas C. Hildebrand, Jr., V. Clair Allen and Stephen E. Darling respectfully request that the Court deny the Petition for a Writ of Certiorari of the Petitioner Wilburt A. Seigel.

OPINIONS AND JUDGMENTS BELOW

The United States Court of Appeals for the Fourth Circuit, on November 10, 1993, affirmed the Order dismissing the Petitioner's Complaint issued by the United States District Court for the District of South Carolina, Charleston Division, on January 10, 1992.

The Opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished, per curiam opinion, Seigel v. James Island Public Service District, et al., No. 92-1204 (4th Cir. Nov. 10, 1992), and is found in Appendix A of Petitioner's

Petition for Certiorari, at pages 1-A through 3-A.

The Order of the District Court is not separately published, but is set out in Appendix B of Petitioner's Petition for Certiorari, at pages 6-A through 9-A. The District Court adopted, as its Order, the Report and Recommendation of the United States Magistrate rendered on August 5, 1991. That Report and Recommendation is found in Appendix C of Petitioner's Petition for Certiorari, at pages 10-A through 47A.

The Petition for Rehearing was denied by the Fourth Circuit on December 16, 1993. The Order denying the Petition for Rehearing is found in Appendix A to Petitioner's Petition for Certiorari, at page 4-A.

JURISDICTION

Petitioner cites as his jurisdictional basis 28 U.S.C. §1257(3). No such subsection of that statute exists, however, nor does 28 U.S.C. §1257 apply to this case, since the opinion below was rendered by a federal court of appeals, not a state court.

Presumably, Petitioner means to rely on 28 U.S.C. §1254(1). This case, however, presents no special or important reason for granting certiorari. Sup. Ct. R. 10. Specifically, the decision of the Court of Appeals in this case is not in conflict with either the decision of another United States Court of Appeals or with the decisions of this Court. Additionally, the decision below does not decide an important question of federal law which has not been, but should be, settled by this Court. Nor does it depart from, or

sanction a departure from, the accepted and usual course of judicial proceedings. The Court should deny the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arose as a result of a decade long attempt by the James Island Public Service District (the "District") to have Petitioner, Wilburt A. Seigel ("Seigel") connect his James Island home to the

District's sewer system as required by the District's Wastewater Collection Regulation passed March 26, 1979. Seigel has refused to connect his home at 1058 Bradford Avenue, James Island, South Carolina, to the system because he believes that the sewer system is unsafe, unhealthy and otherwise improper.

Respondent Sinkler & Boyd, P.A. ("the Sinkler firm"), is a private law firm with offices in Charleston, Columbia and Greenville, South Carolina. It, and its predecessor firm, Sinkler Gibbs & Simons, have long represented the District. Respondents Stephen E. Darling and Thomas C. Hildebrand, Jr. are members of the Sinkler Firm. Respondent V. Claire Allen is a former member of the Sinkler firm.

In 1984, the Sinkler firm was retained by the District to institute an action against Seigel. The purpose of that suit

was to obtain an injunction requiring Seigel to connect to the District's sewer system. An Order granting the requested relief was granted by the trial court and affirmed by the South Carolina Court of Appeals and Judgment was entered on March 25, 1987.

Thereafter, in 1988, the Sinkler firm filed, at the direction of the District, a Rule to Show Cause why an Order should not be issued finding Seigel in contempt for his failure to comply with the March 25, 1987 Order of Judgment. On October 26, 1989, South Carolina Circuit Court Judge William T. Howell ("Judge Howell") adjudged Seigel in contempt for failure to comply with the March, 1987 Order and sentenced him to six months in jail. However, Judge Howell granted Seigel sixty (60) days within which to hook up to the District's sewer system so as to avoid

incarceration. Seigel then filed a Writ of Supersedeas in the South Carolina Supreme Court to stay Judge Howell's contempt sentence. The Court denied the Petition by Order dated December 16, 1988.

On January 3, 1991, Seigel filed the present complaint alleging violation of 42 U.S.C. §1983. Among the Defendants named in this lawsuit were the Sinkler firm and the individual attorneys who represented the District in the underlying action against Seigel.

Subsequently, all Defendants filed Motions to Dismiss. After Seigel responded to these Motions, a hearing was held before the United States Magistrate on March 20, 1991, at which time all parties agreed that the Magistrate would decide the Motions on the moving papers and memoranda without oral argument. On August 5, 1991 the Magistrate issued his

Report and Recommendation which granted all Defendants' Motions to Dismiss.

Seigel timely filed objections to the Magistrate's Report and the matter was reviewed, de novo, by the United States District Judge. By Order dated January 10, 1992, the District Judge adopted the Magistrate's Report and Recommendation as the Order of the Court, thereby dismissing Seigel's Complaint as to all Defendants.

Thereafter, Seigel timely appealed the District Court's Order to the United States Court of Appeals for the Fourth Circuit. In an unpublished per curium opinion, dated November 10, 1993, the Fourth Circuit affirmed the District Court Order. Thereafter, by Order dated December 16, 1993, the Fourth Circuit denied Seigel's Petition for Rehearing. Seigel now seeks a Writ of Certiorari to

review the decisions below dismissing his lawsuit.

SUMMARY OF THE ARGUMENT

In all matters related to this case, the law firm and the individual attorney Defendants acted solely as privately retained counsel for the purpose of initiating certain legal proceedings on behalf of their client in South Carolina state court. The lower courts were correct in holding that such action did not constitute action under color of state law for 42 U.S.C. §1983 purposes; and in dismissing the Plaintiff's Complaint against the law firm and the individual attorney Defendants.

ARGUMENT

THE ACTIONS OF THE LAW FIRM AND THE INDIVIDUAL ATTORNEY DEFENDANTS IN THIS CASE PROVIDE NO BASIS FOR

ASSERTING LIABILITY AGAINST THEM UNDER 42 U.S.C. §1983.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Gomez v. Toledo, 446 U.S. 635 at 640 (1980), the United States Supreme Court set forth the two requirements necessary to state a cause of action under 42 U.S.C. § 1983:

> First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right

> acted under color of state or territorial law.

The sine qua non of civil rights action is state action under the Fourteenth Amendment. West v. Atkins, 487 U.S. 42 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). State action is present if the conduct allegedly causing the constitutional deprivation may be fairly attributed to the state. West v. Atkins, 487 U.S. 42 (1988). A two-factor test is used to determine "fair attribution":

> a. Exercise of right created by state: the deprivation is caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.
>
> b. And by a state actor: party charged with deprivation must be a state actor, that is, must be a state official, or has acted together with a state official, or engaged in conduct that is otherwise attributable to the state.

The Sinkler firm is a private law firm which was retained by the District to represent it in certain state court proceedings. The individual attorney Defendants are, or were, members of that firm. The relationship between the Sinkler firm and the District was one of attorney-client, was purely contractual, and was governed by the same principles as governed the Sinkler firm's relationship with any of its other clients. Any actions taken by the Sinkler firm, or the individual attorneys, in this matter were thus those of a private law firm acting on behalf of its client.

Conduct of a private individual or entity may, in certain circumstances which are inapplicable to this case, constitute action under color of state law. See, e.g., Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (1982); Adickes v. S.H.

Kress & Company, 398 U.S. 144 (1970). However, the Supreme Court has held that "a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'." Polk County v. Dodson, 454 U.S. 312 at 317 (1981) quoting U.S. v. Classic, 313 U.S. 299, 326 (1941). The actions of the private attorneys in this case clearly do not meet this test.

The mere fact that an attorney is licensed by the state and is considered an officer of the court has been held to be insufficient to find that he acts under color of state law. See, e.g., Bates v. New York City Transit Authority, 721 F.Supp. 1577 (E.D.N.Y. 1989); Sturm v. Schrank, 43 B.R. 755 (S.D.N.Y. 1984); Phillips v. Singletary, 350 F.Supp. 297 (D.S.C. 1972); Pritt v. Johnson, 264

F.Supp. 167 (M.D.Pa. 1967); Kregger v. Posner, 248 F.Supp. 804 (E.D.Mich.S.D. 1966).

The law is also well established that the action of an attorney on behalf of his clients in a legal proceeding does not constitute action under color of state law for 42 U.S.C. § 1983 purposes. This general rule has been applied widely and includes actions by, inter alia:

(1) Public Defenders, see, e.g., Polk County v. Dodson, 454 U.S. 312 (1981);

(2) Private counsel retained by the State to represent indigents, see, e.g., Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980), cert. denied, 454 U.S. 1141 (1982);

(3) Private counsel retained by private parties, see e.g., Deas v. Potts, 547 F.2d 800 (4th Cir. 1976);

Donlan v. Smith, 662 F.Supp. 352 (D.Md. 1986), aff'd, 820 F.2d 1219 (4th Cir. 1987) (private attorneys representing wife in domestic dispute who obtained contempt order which led to imprisonment); Jackson v. State of South Carolina, 498 F.Supp. 186 (D.S.C. 1979). See also, Dahlberg v. Becker, 748 F.2d 85 (2nd Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (private attorneys representing wife in domestic dispute who obtained contempt order which led to imprisonment); Russell v. Millsap, 781 F.2d 381 (5th Cir. 1985), cert. denied, 479 U.S. 826 (1986); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Taylor v. Diznoff, 633 F.Supp. 640 (W.D. Pa. 1986); Anderson v. Byars, 505 F.Supp. 32 (W.D.Okla. 1980); and

(4) Private counsel retained by governmental officers/bodies, see, e.g., Bates v. New York City Transit Authority, 721 F.Supp. 1577 (E.D.N.Y. 1989) (private attorney retained by the New York City Transit Authority and one of its police officers); Goetz v. Windsor Central School District, 593 F.Supp. 526 (N.D.N.Y. 1984) (12(b)(6) Motion granted private attorney who represented school district on ground that "the conduct of an attorney acting in his professional capacity while representing his client does not constitute action under color of state law for the purpose of § 1983". 593 F.Supp. at 528; Masel v. Industrial Commission of Illinois, 541 F.Supp. 342 (N.D.Ill.E.D. 1982) (12(b)(6) Motion granted private attorneys representing municipality).

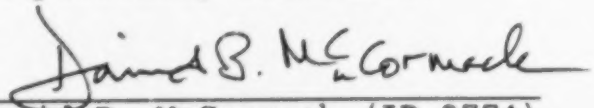
The rationale of these decisions is equally applicable to the present case and supports the lower courts' dismissal of the 42 U.S.C. §1983 claims against the law firm and the individual attorney Defendants. Their participation in the matters leading up to this lawsuit was limited solely to their appearance as privately retained counsel for the purpose of initiating certain legal proceedings on behalf of their client in South Carolina state court. Such action does not constitute action under color of state law for purposes of liability under 42 U.S.C. §1983.

CONCLUSION

The District Court for the District of South Carolina and the Court of Appeals for the Fourth Circuit correctly concluded that no basis existed in this case for

asserting liability under 42 U.S.C. §1983 against the Respondents Sinkler & Boyd, P.A., Thomas C. Hildebrand, Jr., V. Clair Allen and Stephen E. Darling. Because the lower courts decided the issue correctly, these Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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Dated: March 29, 1994